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ABSTRACT

Making reference to concepts grounded in the Fourteenth Amendment of the United States Constitution, this document lists substantive and procedural due process requirements regarding employee termination that administrators must take pains to implement. Justifiable reasons for termination are identified. School administrators have the burden of proof to give "just cause" in an employee dismissal proceeding. "Just cause" evidence requires school officials to maintain accurate employee records; to furnish specific rules and standards that list employee and school goals, objectives, and expectations; and to keep abreast of legal limitations, accepted practices, and ongoing developments in labor-management relations that affect management's right to terminate employees. (JAM)

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TERMINATION OF EMPLOYMENT: SUBSTANTIVE AND PROCEDURAL DUE PROCESS REQUIREMENTS

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The due process clause of the Fourteenth Amendment to the United States Constitution protects an individual from the deprivation of life, liberty, or property. The concept of liberty recognizes two particular interests in the area of public school employment: (1) the protection of an individual's good name, reputation, honor, and integrity, and (2) an individual's freedom to take advantage of other employment opportunities.

Kern Alexander in his book, **American Public School Law**, writes of two types of due process: (1) procedural due process – if an individual is to be deprived of his life, liberty, or property, a prescribed constitutional procedure must be followed. Therefore, the individual must have proper notice that he is about to be deprived of his life, liberty, or property; he must be afforded the opportunity to be heard; and a hearing must be fairly conducted, and (2) substantive due process – if an individual is going to be deprived of his life, liberty, or property, there must be a valid objective and the means used must be reasonably calculated to achieve the objective.

Termination, dismissal, discharge, fire – all these words add up to the same result: employees are removed from the work-place against their will. A termination not only means loss of job, seniority, and other contractual benefits, but also casts doubt on the employee's character and reputation and leaves an indelible mark on his or her work record. Regardless of how exemplary the past conduct and performance, an improper termination will hinder an employee's chances of getting another position.

REASONS FOR TERMINATION

Today employees are terminated for reasons ranging from reduction in force (relating to declining enrollment) to personal fault. Generally, there is little appeal from terminations related to staff cutbacks even if the employee is blameless. However, terminations for personal reasons – incompetence, insubordination, or immorality may be challenged. Upon closer examination, the reasons for personal fault terminations seem to fall into two broad categories: discipline related and performance related.

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Terminating an employee in any organization for violating rules, regulations, or policies appears to be a simple matter at first glance. All the supervisor has to do is observe and document infractions and then take appropriate action. Many school systems, however, do not have clearly stated, well-formulated rules or policies to govern the behavior of their employees. Or if they do, the rules, regulations, and policies are not enforced consistently. Additionally, there are complications in dealing with "problem" employees or cases involving extenuating circumstances.

PERFORMANCE-RELATED TERMINATION

Several situations can lead to dismissing employees for performance-related causes: (1) failure to prove their competency during the probationary period; (2) successfully completing the probationary period but later failing to perform satisfactorily because of technological or organizational changes; (3) being promoted or transferred to positions they cannot handle; (4) a change of attitude or health that adversely affects the employee's willingness or ability to work; or (5) developing personality conflicts with supervisors, peer workers, or subordinates which adversely affect performance.

A generally accepted principle in the employer-employee relationship, even where no bargaining agreement exists, is that the employee shall not dismiss an employee without cause. Many types of professional misconduct have met the "just cause" requirements for discharge.

In some cases the misconduct is considered sufficiently serious to justify dismissal for the first offense even in the face of mitigating circumstances. In a majority of the cases, however, there is no automatic basis for discharge; and all factors relevant to the situation are considered in determining whether the employee deserved termination, some lesser penalty, or no penalty at all. Thus, depending upon the facts and circumstances of each individual case, the action may be upheld, modified, or overturned.

BURDEN OF PROOF REQUIREMENTS

There are two areas of proof in termination cases. The first involves proof of wrongdoing; the second concerns the question of whether the termination should be upheld or modified if wrongdoing or guilt is established.

Often, school administrators must determine if the contract/agreement has been followed, and labor and management must provide the evidence. Typical questions that must be answered include the following:

1. Was the contract/agreement violated?

2. Did the school administration go as far as possible to correct or change the undesirable behavior of the employee?

3. Were there mitigating factors?

4. Did the employee have forewarning of the possible consequences of his conduct?

5. Did the school administration conduct a fair and objective investigation?

6. Did the school administration obtain substantial evidence or proof of wrongdoing or guilt?

7. Were established school system rules, regulations, policies, procedures and penalties applied without discrimination to all employees?

8. Was the degree of discipline reasonably related to the seriousness of the proven offense and to the employee's record with the school system?

The answers to these questions are to be found in the evidence presented throughout the course of a hearing of a specific case.

School administrations are largely responsible for proving a "just cause" for termination, the required quantum of proof is unsettled. Depending on the case, three degrees of proof are required: preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt.

The strictest quantum of proof required in termination cases is "proof beyond a reasonable doubt." The minimum quantum of proof acceptable is "preponderance of the evidence" rule.

Somewhere between "preponderance of the evidence" and "beyond a reasonable doubt" is a third evidentiary standard. This may be referred to as the "clear and convincing evidence" rule. The "clear and convincing evidence" standard finds its most frequent applications in cases involving some sort of reprehensible conduct on the part of the school system, such as discrimination.

GUIDELINES

To assist in the proper handling of employee dismissals, the following guidelines are comprised of the substantive and procedural criteria that has emerged as important factors in a number of cases within a particular category.

In evaluating terminations for willful violation of school system rules, regulations and policies, hearing officers are extremely interested in what the school administration did prior to the termination. They are particularly concerned with whether the school administration: (1) maintained adequate records to justify termination; (2)

conducted a fair and objective investigation and provided the employee due process; (3) informed the employee of all reasons for the termination decision; (4) communicated the rules as well as the penalties for violations; (5) enforced the rules and assessed the discipline fairly and consistently. More specifically, the school administration should:

1. Provide evidence to establish "beyond a reasonable doubt" standard of proof or "clear and convincing proof" for more serious offenses;

2. Give evidence to prove that employee willfully attempted to conceal information when termination is for falsification of the employment application;

3. Follow closely the procedural rules in contract/agreement;

4. Keep complete and accurate records of employee behavior and the progressive staff development procedures that have been followed;

5. Considered the employee's past performance record and length of service prior to discharging an employee for neglect of job duties.

Proving just cause for dismissal is often difficult in cases involving incompetence and/or negligence since the school administration may be partly or wholly at fault for the unacceptable performance. Generally, dismissal is considered too harsh for a single infraction; thus, the principle of progressive staff development receives strong support in these areas. To meet the substantive and procedural requirements, the school administration should:

1. Set reasonable standards of performance in terms of quality;

2. Provide appropriate training and give proper advice and counsel regarding training;

3. Provide specific documentation to prove employee incompetence and/or negligence;

4. Establish and follow a progressive staff development program aimed at helping both incompetent and negligent employees improve their performance;

5. Enforce performance standards consistently and fairly;

6. Conduct a thorough and fair investigation including due process;

7. Consider the employee's work record and length of service.

Insubordination is considered a serious offence, yet school administrators are expected to use discretion in assessing the penalty for insubordinate behavior. Dismissals for insubordination are usually upheld if the supervisors' directives are contractually proper and reasonable and the proper procedures have been followed. To meet the substantive and procedural requirements, the school administration should:

1. Establish employee work assignments that are contractually proper and reasonable;

2. Communicate clearly, both orally and in writing, employee work directives/ instructions;

3. Give sufficient forewarning concerning a change in employee work assignments;

4. Conduct a thorough and fair investigation including due process;

5. Inform the employee of the reason for dismissal at the time of dismissal;

6. Follow a progressive staff development program aimed at improving employee behavior;

7. Give adequate warnings concerning the consequences for insubordinate behavior;

8. Consider the employee's work record, length of service, and other extenuating circumstances.

Upon examination of cases involving union activities, it can be concluded that dismissal is considered just when there is sufficient proof of active leadership and participation in an unauthorized work stoppage. Many union related activities, however, are not dismissal offenses. Specifically, the school administration should:

1. Present a high degree of proof to support a charge that the employee played a prominent and responsible role in causing or prolonging an illegal work stoppage;

2. Review contract/agreement to determine if certain union activities are dismissal offenses.

Whenever management is involved with labor, there will be labor-management relations problems. Although school systems have reserved the right to discipline and terminate, they must comply with collective bargaining agreements and federal and state labor relations laws.

Evidence of increasing concern for protecting employees from unfair dismissal continues to be reflected in legislation, arbitral and judicial decisions, and public opinion. Thus, the legal limitations and accepted practices that affect management's right to terminate may change significantly in the next few years. School administrators and employees need to stay abreast of the ongoing developments in labor-management relations.